



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY RELIEF DENIED: November 7, 2008

CBCA 708

CH2M HILL HANFORD GROUP, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Kenneth B. Weckstein and Shlomo D. Katz of Brown Rudnick LLP, Washington, DC, and Stanley J. Bensussen of CH2M HILL Hanford Group, Inc., Richland, WA, counsel for Appellant.

Joseph B. Schroeder and Holly Kay Botes, Office of River Protection, Department of Energy, Richland, WA, counsel for Respondent.

Before Board Judges **POLLACK**, **McCANN**, and **DRUMMOND**.

McCANN, Board Judge.

CH2M HILL Hanford Group, Inc.(CH2M HILL) claims entitlement to an additional fee on this cost-reimbursement contract. It claims that the Department of Energy (DOE) changed the contract when it directed CH2M HILL to perform additional non-fee-bearing work (additional safety related work). Allegedly, this change substantially reduced the amount of fee-bearing work CH2M HILL could perform, and was entitled to perform, under the contract. The parties have cross-moved for summary relief.

Background

CH2M HILL is the prime contractor to the Department of Energy (DOE), Office of River Protection (ORP), under contract no. DE-AC27-99RL14047. Appellant's Statement of Uncontested Facts (AUF) 1. Under the contract CH2M HILL is responsible for managing and executing the contract projects, operations, and other activities as described in section C.3 of the contract. AUF 3. The contract involves cleanup of waste contained in tanks at DOE's Hanford Site in Washington State. AUF 4.

The original mission of the Hanford Site related to the production of weapons-grade nuclear material. The production of weapons material generated both solid and liquid radioactive waste which was stored in 177 large (50,000 to 1,000,000 gallon) capacity underground single-shell and double-shell tanks. The waste in these tanks must be retrieved, treated, and disposed of in a permanent waste repository. AUF 5. The material in these tanks has the potential to generate vapors that are not radiological, but contain ammonia and various volatile organic compounds. AUF 6. Vapors can escape from the tanks through normal venting and leaks. The escaped vapors can cause strong odors and, in sufficient concentration, could be harmful to human health. AUF 8.

CH2M HILL is one of a succession of contractors that, under contracts with DOE, have had certain responsibilities for managing the Hanford Site Tank Farm. Westinghouse Hanford Company (Westinghouse) was the tank farm contractor from 1986 until September 1996. In 1996, Fluor Hanford, Inc. assumed management of the Project Hanford Management Contract. Its subcontractor, Lockheed Martin Hanford Corporation (LMHC), had responsibility for the tank farm. AUF 17. LMHC became the tank farm prime contractor in 1998. LMHC and DOE entered into contract no. DE-AC06-99RL14047 on September 30, 1999. AUF 18. CH2M HILL purchased LMHC in December 1999. AUF 19. Modification M026 changed the contract number to DE-AC27-99RS14047. DOE extended the contract period of performance through September 30, 2008. AUF 20-21.

On or about July 10, 1996, Westinghouse issued a report entitled "Tank Waste Rededication System Resolution of Potentially Hazardous Vapor Issues." That report is commonly referred to as the "Hewitt Report." AUF 27. DOE placed a copy of the Hewitt Report in ORP's Reading Room. AUF 28.

The executive summary of the Hewitt Report summarizes its findings, in part, as follows:

After four years, sufficient information has been collected to evaluate the effectiveness of the strategy and the resulting control measures. The

conclusion is that the issues associated with protecting employees from overexposure to vapors during tank farm work are defined and controlled.

Employee exposure incidents have virtually ceased due to the implementation of controls around potential vapor release points and as a result of better communications regarding vapor orders and risks. Additional studies are not needed to verify these conditions. . . .

It is concluded that tank farm worker health and safety considerations caused by the inhalation of potentially hazardous vapors have been resolved.

AUF 35. The Hewitt Report was the primary document that formed the technical basis for CH2M HILL's industrial hygiene strategy, including decisions about whether to monitor for certain chemicals or require the use of supplied air. AUF 37. ("Supplied air" is like scuba gear.) LHMC's Health and Safety Plan (HASP) did not require the full-time use of supplied air when working in the tank farms. AUF 38.

The Contract

The contract is a performance-based, cost-reimbursement contract with incentives. Complaint ¶ 1; Respondent's Statement of Uncontested Facts (RUF) 14. CH2M HILL earns fees by completing specified incentivized work set forth in the contract. Complaint ¶ 31; RUF 15. Section B.3 of the contract, entitled Estimated Cost and Fee, sets forth the estimated budget authority for each fiscal year (FY) from FY 2001 through FY 2006 and the fee. The total fee pool established for FYs 2003 through 2006 was \$72 million. AUF 42. Section C.2(a)(2) of the contract required the contractor to:

Complete and maintain an integrated life-cycle baseline which reflects: (a) technical scope of work specified in this Contract, (b) project/schedules with critical paths identified, and (c) a cost profile based on a resource-loaded schedule. . . . The baseline shall be the basis of budget development, input to risk analysis, and prioritization of work.

Supplemental Appeal File, Exhibit 8 at CHG0809.

Section C.3(a) of the contract stated, in part:

The River Protection Project (RPP) scope of this Contract encompasses activities identified in the Tank Farm Contract River Protection Project Baseline (hereafter "Tank Farm Contract River Protection Project Baseline")

or “Baseline”) as amended by approved Baseline Change Requests (BCRs) needed to: (1) safely store, operate and interim stabilize tank waste within an approved authorization basis for such operations applying appropriate life cycle asset management; (2) retrieve and dispose waste from and interim close single shell tanks consistent with the TPA [Tri-Party Agreement] and other applicable Federal or State laws, regulations; and retrieve and dispose waste from double shell tanks, including completion of upgrades and waste retrieval and transfer systems; (3) construct, operate, and maintain facilities necessary for storage/disposal of immobilized waste whether onsite or offsite, including balance of plant construction; (4) stabilize facilities and preparation of tank closure plans for SSTs [single-shell tanks] as contemplated in the TPA; (5) execute supporting project management responsibilities including strategic analysis, baseline management, contracting functions, compliance, finance and administration, and (6) perform decommissioning and decontamination to support improved long term operational efficiencies, as set forth in the following sections:

Supplemental Appeal File, Exhibit 8 at CHG0818.

Section C.2(d)(2)(i) of the contract required the contractor to:

Take necessary actions to prevent serious injuries/illnesses and/or fatalities and prevent radiological or chemical exposures to worker and environmental releases in excess of established limits;

Supplemental Appeal File, Exhibit 8 at CHG0815.

CH2M HILL was required by DOE Order 440.1A to protect workers from exposure to the lesser of the OSHA Permissible Exposure Limits or the Threshold Limit Values specified by the American Conference of Government Industrial Hygienists. AUF 71. Section C.3(a)(1)(i) of the contract indicated:

Contractor shall provide an adequate, comprehensive, and reliable safety basis for the management and storage of waste managed by Contractor under the scope of this contract. This will be accomplished by developing, operating to [sic] and maintaining an integrated Authorization Basis (AB), and by resolving outstanding safety issues and unreviewed safety questions to ensure safe storage and retrieval of waste.

Supplemental Appeal File, Exhibit 8 at CHG0818.

Vapors Issue

In early 2002 and continuing into 2003, CH2M HILL tank farm workers voiced concerns over the risks of vapor exposure. Employees exposed to vapors and odors reported experiencing temporary physical effects, primarily headaches and nausea, which they attributed to the exposure. AUF 78. In 2002 and 2003, CH2M HILL did not require supplied air for routine tank farm activities. The baseline prior to March 2004 did not schedule or include costs for full-time use of supplied air when performing routine work in the tank farms. AUF 83.

CH2M HILL's executive summary of the March 2004 ORP monthly report states:

As part of the response to vapor issues in tank farms, CH2M HILL's management announced that, effective March 25, 2004 and until further notice, tank farm work would be performed with respirators.

Respondent's Exhibits to Cross-Motion For Summary Judgment Dismissal, Exhibit 10.

On March 27, 2004, CH2M HILL's president and general manager issued a memorandum to all CH2M HILL employees and subcontractors which states, in part:

On Thursday [March 25, 2008], the Vice Presidents of Waste Feed Operations and Closure projects made the decision to require the use of respirators for all work within tank farm boundaries. I fully support their actions. . . .

. . . .

There are two primary reasons for this action now. First, as you know, on Thursday there were three additional situations where members of our workforce were concerned enough about the odors they encountered that they requested and received medical evaluations. The odors experienced by our employees did not result in detectable levels of chemicals by monitoring instruments at the job site. All three employees were released back to work without restrictions. The fact that the events occurred at all cause [sic] us concern. We need to ensure that our processes are at least adequate to provide all employees the assurance and confidence necessary to perform their duties without hesitation or anxiety. Second, our client agreed with our decision. Additionally, they told us to complete the extensive reviews and assessments currently underway and review the conclusions and recommendations with them before resuming routine activities without respirators.

Respondent's Exhibits to Cross-Motion For Summary Judgment Dismissal, Exhibit 9.

On March 26, 2004, ORP's manager, Mr. Schepens, issued a letter to CH2M HILL entitled "DIRECTION ON TANK FARM WORK." In that letter Mr. Schepens wrote:

Before performing work in the tank farms without respiratory protection, I am directing that CH2M HILL:

- Re-evaluate the technical basis for monitoring organic and non-organic tank vapors;
- Re-evaluate the adequacy of the monitoring equipment and the procedures directing its use;
- Re-evaluate engineered features that have the potential to reduce or eliminate exposures;
- Re-evaluate the adequacy of tank farm worker personal monitoring for tank vapors;
- Increase its industrial hygiene monitoring of work activities; and
- Evaluate expanded use of personal protective equipment.

Before performing work in the tank farms without respiratory protection, please review the results of these actions with me.

AUF 115.

During February and March 2004, DOE's Office of Independent Oversight and Performance Assurance (OA) investigated worker complaints at Hanford, including those relating to vapors. AUF 108. OA issued a report in April 2004 entitled "Investigation of Worker Vapor Exposure and Occupational Medicine Program Allegations at the Hanford Site" (OA Report) which identified perceived weaknesses in CH2M HILL's industrial hygiene program. AUF 110. Among the findings in the report were the following:

Finding # C-1: CH2M HILL tank vapor characterization is not sufficient to support industrial hygiene exposure assessment and respiratory protection programs.

Finding # C-2: Compliance with OSHA and DOE exposure limits for chemical vapors cannot be sufficiently demonstrated due to weaknesses in the CH2M HILL Exposure assessment program.

Finding # C-3: Chemical vapor exposure data obtained by CH2M HILL through the use of field instrumentation, particularly direct-reading instruments is in some cases unreliable and may not accurately reflect exposures of workers to some chemical vapors being released from the tanks.

Appeal File, Exhibit 18, at DOE/ORP at 000306. By letter of June 9, 2004, DOE directed CH2M HILL to prepare a corrective action plan (CAP) in response to the OA Report. AUF 121. By letter of July 28, 2004, CH2M HILL submitted its CAP. Supplemental Appeal File, Exhibit 3.

Discussion

Summary relief is appropriate only if no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed Cir. 1987). The burden is on the moving party to establish “that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.” *Kokosing Construction Co.*, EBCA 439-2-90, 91-1 BCA ¶ 23,508, at 117,869 (1990). A material fact is a fact which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Evidence sufficient to establish the existence of a genuine dispute of a material fact need not be admissible at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 324 (1986). The evidence presented, including all inferences, is construed in favor of the party opposing summary relief. *Automated Services, Inc.*, EBCA 386-3-87, et al., 87-3 BCA ¶ 20,157, at 102,027. Significant doubts are to be resolved in favor of the non-moving party. *Golden West Refining Co.*, EBCA C-9208134, et al., 94-3 BCA ¶ 27,184, at 135,468. Contract interpretation is a question of law, *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984), which may, therefore, be resolved by summary relief if the criteria for summary relief are present.

The parties disagree on a number of key issues and the surrounding facts. The parties disagree on the work that was required under the contract and the baseline. They also disagree on the work that was fee-bearing and the work that was non-fee-bearing, if, in fact, any work was non-fee-bearing. CH2M HILL alleges that the Government changed the contract when it required CH2M HILL to perform additional non-fee-bearing work. CH2M HILL alleges that this reduced the amount fee-bearing work it could perform, entitling it to an additional fee. CH2M HILL alleges that it is entitled to \$7.235 million in compensation for lost fees. The Government disagrees. It contends that it did not change the contract or the baseline, and did not increase or decrease the fee-bearing and non-fee-bearing work. Furthermore, it contends that all work under the contract is fee-bearing work.

There is disagreement between the parties pertaining to the nature and effect of the contract baseline. It is clear that the contract baseline was submitted by CH2M HILL, as was required by the contract. It is unclear, however, just how this baseline was created, and whether it was negotiated or approved, if, indeed, it was. CH2M HILL alleges that the baseline constitutes a binding modification to the contract defining the work to be accomplished. The Government, on the other hand, contends that it is just a deliverable under the contract created in accordance with the statement of work, and used to measure contract performance. It contends that the baseline is a planning tool and not a contractually binding document.

The precise meaning and effect of the baseline in this case is not apparent or obvious from a perusal of the documents in the record. In fact, it appears that only parts of the entire baseline have been put into the record. For the Board to correctly interpret the intent, purpose, and effect of the baseline, the facts surrounding its creation and its approval, if there was an approval, must be presented, and possibly the entire baseline must be reviewed. Material facts regarding the representations made, and the understandings of the parties regarding the contract, the baseline, and how the fee is earned are in dispute and summary relief under such circumstances would not be appropriate.

In addition, CH2M HILL is contending that at the time of contract award the parties understood and agreed upon the extent of the safety precautions that were needed to perform the contract. CH2M HILL contends that the Hewitt Report was the primary document that formed the basis for CH2M HILL's industrial hygiene strategy. This strategy included decisions about monitoring for certain chemicals, the use of respiratory protection, and the use of supplied air. CH2M HILL contends that the Government provided this document to CH2M HILL and understood and agreed that CH2M HILL would rely on it in forming CH2M HILL's industrial hygiene strategy. The Government, on the other hand, disputes this. It contends that there was nothing in the statement of work or anywhere in the contract that referred to the Hewitt Report. It contends that CH2M HILL was required to investigate the premises, perform whatever tests were necessary, and formulate a proper industrial hygiene strategy. It also contends that CH2M HILL's industrial hygiene program was not in compliance with contract requirements and applicable regulations. The significance of this difference of opinion may bear directly upon the contract baseline. If CH2M HILL improperly relied on the Hewitt Report and improperly formulated the industrial hygiene strategy, then the contract baseline may have been improperly formulated. The material facts surrounding this issue are not clear and certainly are not agreed upon.

Furthermore, CH2M HILL seems to take the position that conditions regarding vapors at the site would remain exactly the same during the course of the contract. It contends that it was only required to follow the safety procedures set forth in its industrial hygiene strategy,

which only addressed the conditions present at the time the Hewitt Report was issued in 1996. The Government strongly disagrees. The facts surrounding this issue are unclear and certainly not agreed upon. Accordingly, summary relief would not be appropriate.

CH2M HILL also contends that the Government changed the contract when it directed CH2M HILL to re-evaluate various aspects of its tank monitoring program, to not work in the tank farms without respiratory protection until the re-evaluation was completed, and to prepare a corrective action plan. CH2M HILL contends that none of this was necessary as its safety program was perfectly adequate. The Government, on the other hand, contends that its direction was proper and in accordance with the contract under the circumstances, which included recent employee complaints of the smell of toxic vapors. The material facts surrounding whether there was sufficient evidence of the existence of harmful vapors to warrant such direction by the Government and whether such a direction was in accordance with the contract, or was a change to the contract, are in dispute. Thus summary relief would be inappropriate. Further, there is a factual dispute as to whether the Government directed the use of contained air for safety reasons.

There are other material facts in dispute in this case. Among them are facts relating to:

- a. Whether DOE's direction to re-evaluate safety measures, use respiratory protection, and prepare a corrective action plan required CH2M HILL to protect workers from exposure to a more stringent standard of vapor detection and control than was required by the contract or whether such a direction imposed on CH2M HILL the requirement to meet the subjective standard of someone simply being able to smell vapors;
- b. Whether the Government breached its duty to cooperate with CH2M HILL when it rejected CH2M HILL's baseline change requests and certified claim;
- c. Whether the parties were mutually mistaken at the time of contract award about the adequacy of the existing vapor protections;
- d. Whether the fee pool was properly created and allocated under the contract; and
- e. Whether CH2M HILL's claim for fees not earned is barred by accord and satisfaction.

In considering motions for summary relief, we cannot try issues of fact, i.e., weigh evidence or judge credibility, but only determine whether there are issues to be tried. *Anderson*, 477 U.S. at 249. Here there are genuine disputes about the meaning and effect of

the baseline, the safety requirements of the contract, and many other things. On the facts presented in the cross-motions, and drawing all reasonable inferences in favor of the non-moving party, we conclude that neither appellant nor respondent is entitled to judgment as a matter of law.

Decision

Appellant's motion for summary relief and respondent's cross-motion for summary relief are **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

HOWARD A. POLLACK
Board Judge

JEROME M. DRUMMOND
Board Judge